

SAFLII Note: Certain personal/private details of parties or witnesses have been redacted from this document in compliance with the law and [SAFLII Policy](#)

IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, PORT ELIZABETH

CASE NO: 2665/2017
Date heard: 10 May 2018
Date delivered: 29 May 2018

In the matter between

A. B. H. N.O. Applicant

And

THE MINISTER OF HOME AFFAIRS N.O. First Respondent

DIRECTOR GENERAL OF HOME AFFAIRS N.O. Second Respondent

MR. MZALISI N.O. Third Respondent

JUDGMENT

GOOSEN, J.

- [1] There are presently three applications before this court. They relate to an order made by Revelas J on 22 September 2017 (hereafter the 'main application'), the details of which I shall set out hereunder. The first application, in sequence, is one in which the applicant seeks to have the respondents committed for contempt of the order of Revelas J. The second is an interlocutory application in which the applicant seeks to have one Deon Erasmus (hereafter 'Erasmus'), who is the Director of Legal Services in the Department of Home Affairs, joined as a fourth respondent in the contempt proceedings. The third application is one brought by the respondents for rescission of the order of Revelas J. I shall, for convenience, refer to the parties as they are cited in the main application.
- [2] The underlying issue in these applications concerns the immigration status of two minor orphaned children who are presently in the care of the Protea Child and Youth Care Centre by order of the

Children's Court. The applicant is a registered social worker employed by the ACVV.¹ He has been appointed as the case worker for the minor children. He acts in that capacity as well as in terms of s 38 (b) of the Constitution read with s 15 (2) (b) of the Children's Act, 38 of 2005.

- [3] The children are E. N. (hereafter EN), a 14 year old girl, and G. N. (GN), a 7 year old boy. EN is presumed to have been born in the Democratic Republic of the Congo (hereafter the DRC) on [...] 2004. She came to South Africa with her biological mother, D. T. N. (hereafter 'D.') during or about 2010. The identity, nationality and whereabouts of EN's biological father is unknown.

- [4] Upon her arrival in South Africa D. applied for asylum at the Port Elizabeth Refugee Reception Office in terms of the Refugees Act, 130 of 1998. She was issued with a section 22 temporary asylum seeker permit which was extended from time to time.

- [5] According to the last available extension² D.' temporary asylum permit was set to expire on 22 September 2016. The reason for the extension is recorded as 'awaiting judicial review'. EN was also issued with a section 22 permit and it too, was extended from time to time. The extension of her permit records as the reason that she is "accompanying parent, awaiting judicial review to be finalised" (sic).

- [6] It appears from D.' asylum seeker permit that she was born on [...] 1990. The permits record that EN was born on [...] 2004.

- [7] While living in South Africa D. met and entered into a relationship with Mr S. M., who hails from Zimbabwe. As a result of this relationship GN was born in South Africa on [...] 2011. GN's birth was reported. A handwritten Unabridged Birth Certificate records the date of birth and details of the mother. There are no details of the father. Mr M. passed away on 10 June 2013. The death certificate records his citizenship as "RSA". His country of birth is recorded as Zimbabwe and his province of birth as Manikaland Province.

¹ The organisation, previously known as the Afrikaanse Christelike Vroue Vereeniging, is a non-profit organisation which provides, inter alia, extensive social work and child protection services for children.

² It appears that 9 extensions were issued following the original permit issued in Port Elizabeth on 14 June 2010.

- [8] After the death of Mr M., D. and the two children were cared for by a Congolese Pastor, Mr T. and his wife. D.' application for asylum status had been rejected by the Refugee Status Determination Officer as 'manifestly unfounded'. She had however pursued a review by the Standing Committee for Refugee Affairs (the SCRA). Prior to the SCRA's determination of the review, D. passed away on 6 August 2016.
- [9] Pastor T. and his wife continued to care for the two minor children orphaned by their mother's death. They approached the Cape Town Refugee Centre for assistance and they were referred to the Nelson Mandela Refugee Rights Centre. The latter Centre referred the case to the Department of Social Development and the ACVV. A case worker was appointed and the children were placed in care. In or about December 2016 they were placed at the Protea Youth Centre by order of the Children's Court. It is not necessary for present purposes to detail the steps taken by the social workers to facilitate contact with possible family members in the DRC or elsewhere. It suffices to state that the Department of Social Development formed the view that the two children should remain together and that they should remain in South Africa.
- [10] In order to find a durable solution for the children the Refugee Rights Centre made an application in terms of s 31 (2) (b) of the Immigration Act, 13 of 2002 on behalf of the children. That section entitles the Minister to grant rights of permanent residence to a foreigner when special circumstances exist which would justify such a decision. When no response to the application was received and following demands the applicant launched the main application on 8 August 2017.
- [11] The main application was served on the respondents and no opposition was noted. In the main application the applicant sought, inter alia, an order declaring the first respondent's failure to consider and decide on the application for exemption for EN to be inconsistent with the Constitution; to direct the first respondent to decide the application; and to declare that GN is a South African citizen in terms of section 2 (2) of the South African Citizenship Act.
- [12] The matter came before Revelas J on 21 September 2017. On that day the learned judge heard full argument on the matter by applicant's counsel, Ms Crouse and, thereafter, on 22 September 2017 made the following order:

1. That E. M. N. and G. N. are declared “unaccompanied minors” for which a durable solution must be found in terms of South Africa’s international law obligations.
2. That the failure of the First Respondent to consider and decide upon E. M. N.’s application for exemption as contemplated in Section 31 (2) (b) of the Immigration Act 12 of 2002, is declared to be inconsistent with the Constitution of South Africa, 1996 and an infringement of her right to lawful administrative action.
3. That the First Respondent is directed:
 - 3.1. To consider and decide upon E. M. N.’s application for exemption as contemplated in section 31 (2) (b) of the Immigration Act 12 of 2002 within one month of the date of this order.
 - 3.2 To inform the applicant’s attorneys and this Court in writing within five days of the outcome of the said application for exemption, and in the event that the application is unsuccessful to include the reasons in such notification.
4. That G. N., born on [...] 2011 is declared to be a South African citizen by birth, as contemplated in section 2 (2) of the South African Citizenship Act 88 of 1995, as amended.
5. That the respondents are ordered to give effect to the declaratory order in the preceding paragraph by ensuring:
 - 5.1 that the particulars of birth of the minor child, G. N. are included in the population register of South Africa, and
 - 5.2 that the applicant is furnished with an amended birth certificate pertaining to G. N. containing a valid identification number
6. That in the event of the respondents not being able to comply with the orders set out in the preceding paragraph, the third respondent is directed to deliver and affidavit to this Court, after service thereof on the applicant’s attorneys, setting out such further information needed and/or what steps are being taken by the Department to comply with the order within one month of the date of this order.
7. That this application is postponed to 7 November 2017 for:
 - 7.1 Compliance by the first respondent with the order as set out in paragraph 2 above;
 - 7.2 Compliance by the third respondent with the order set out in paragraph 5 above, alternatively by the first respondent with the order set out in sub-paragraph 7.2 above. (sic)
8. That the applicant or any other interested person is entitled to approach this Court on the same papers, amended if so advised, to obtain further relief in the best interest of E. M. N. and / or G. N. and or to seek to review of the first respondent’s decision in respect of section 32 (2) (b) exemption applications.

[13] It is this order which forms the subject of the contempt and joinder application and the application for rescission brought by the respondents. I shall, hereunder, deal first with the contempt application (and the related joinder application) and thereafter with the rescission application.

The contempt application

- [14] The contempt application was commenced on 4 November 2017 and set down for hearing on 7 November 2017, being the same date to which the main application was postponed for the purposes of filing the compliance affidavits as directed. The application was postponed to 21 November and again to 28 November 2017. On that day a rule *nisi* was issued by Revelas J calling upon the respondents to show cause on 12 December 2017 why they should not be held to be in contempt of the order of 22 September 2017 and committed to imprisonment for such contempt. On the return date the matter was again postponed to 16 January 2018. Jaji J made an order directing the first and third respondents to file a report by 9 January 2018 indicating what steps had been taken to ensure compliance with the court order. On 15 January 2018 the respondents commenced the rescission application. It appears that the contempt application was therefore postponed by agreement from 16 January to 13 February 2018.
- [15] On 17 January 2018 the applicant launched an interlocutory application to join Erasmus as the fourth respondent in the contempt application. This latter application was heard by Eksteen J on 18 January 2018. A rule *nisi* was issued with 13 February 2018 as the return date. On 13 February 2018 both the contempt and joinder applications were postponed to 20 February and thereafter, by agreement for hearing on 10 May 2018.
- [16] The rule *nisi* issued on 28 November 2017 provides as follows:
1. That a rule *nisi* do issue calling upon the Respondents to show cause on the 12th December 2017 at 09h30 or so soon thereafter as the matter can be heard, why an order in the following terms should not be made:
 - 1.1 That the First Respondent is declared to be in contempt of paragraphs 1 to 3 of the order of this court dated the 22nd September 2017, under the above mentioned case number.
 - 1.2 That the Second Respondent is declared in contempt of paragraphs 1.4 and 1.5 of the order of this court dated the 22nd September 2017, under the above case number. (sic)
 - 1.3 That the Third Respondent is declared to be in contempt of paragraphs 1, 4, 5 and 6 of the order of this court dated 22nd September under the above mentioned case number.
 - 1.4 That the Respondents are accordingly sentenced to undergo three months imprisonment suspended for a period of three years from the date of this order on condition:
 - 1.4.1 That he/she forthwith take all such necessary to adhere to the court order dated the 22nd September 2017, issued under the above mentioned case number.
 - 1.4.2 That he/she report to this Honourable Court, in writing within 10 days after this order, what he / she has done to facilitate the execution of this order;
 - 1.4.3 That he / she is not again convicted of contempt of court committed within this period of suspension.

2. That the Respondent are ordered to pay the costs of the application a scale as between attorney and client. (sic)

- [17] The applicant states in his founding affidavit that Revelas J's order of 22 September was served on the first and second respondent by service on the office of the State Attorney on 27 September 2017. Thereafter the sheriff was directed to serve the order upon the first respondent personally. The return of service indicates that service was effected on a Mr Nthangeni, a legal clerk employed at the head office of the Department. The applicant also states that the court order, together with a copy of the application for exemption was sent to the first respondent by registered mail. It appears that this item was collected by E Mohale on 10 October 2017.
- [18] The applicant accordingly asserts that the first and second respondents have personal knowledge of the order. He alleges that the first respondent, as at the date of the launch of the contempt application, had failed to give effect to the order. I will return to this hereunder.
- [19] In regard to the conduct of the third respondent who was required to give effect to paragraphs 4 and 5 of the order of 22 September³, the applicant states that he attended at the offices of the Department in Port Elizabeth on 25 October 2017, together with GN, in order to register the minor as a South African citizen. He requested the assistance of a Mrs Bloem who had previously assisted the applicant. She did not assist them. Instead they dealt with the third respondent to whom they gave a copy of the court order. He is alleged to have said that he has a period of 7 days to respond to the order, an allegation that the third respondent denies. In any event, on 2 November the applicant telephoned the third respondent to enquire about the registration of GN. He was told to contact Mrs Bloem.
- [20] Based on these allegations the applicant contends that the respondents are in contempt of the court order and that the court ought to impose the punishment set out in the notice of motion.
- [21] The third respondent deposed to and filed an affidavit on 9 January as directed by Jaji J on 13 December. He states that he is the acting office manager of the Port Elizabeth office of the Department. He points out that he had filed an affidavit dated 13 December 2017 as he was required to do in terms

³ The reference in the order (as quoted) to paragraphs 1.4 and 1.5 is clearly an error and ought to read paragraphs 4 and 5.

of the court order of 22 September. He explained both why the affidavit was filed on that date and the reasons for his non-compliance with paragraphs 4 and 5 of the order of Revelas J. In his affidavit of 9 January he repeats the explanation.⁴

- [22] He states that he received notice of the court order from Ms Botha of the State Attorney's office on 28 September 2017. He has no delegated authority to deal with legal matters and is required to defer to Legal Services within the Department based at the Pretoria head office. He states that he was uncertain how to comply with the order since, at face value the provisions of section 2 (2) of the Citizenship Act do not apply to GN. He was awaiting direction from Legal Services in this regard. He states that the applicant visited the Department's offices on 25 October. He denies that he told the applicant that he has seven days to respond to the order. By 3 November 2017 he had become concerned that he had not yet received any directives from Legal Services as to what steps needed to be taken. He therefore contacted a senior legal advisor. He was told that a legal advisor would be assigned to the case.
- [23] On 6 November 2017 he received a copy of the contempt application. He immediately arranged a consultation with the State Attorney which took place on 7 November. In this consultation he explained what he considered to be a conflict between terms of the order and section 2(2) of the Citizenship Act. What followed was correspondence relating to a postponement. At that stage Ms Botha of the State Attorney had still not received instructions regarding the contempt application.
- [24] On 4 December 2017, the third respondent received an email from applicant's attorneys advising him of the rule nisi which was granted on 28 November. He immediately contacted Mr Wittes of Legal Services to seek his urgent advice. On 11 December 2017 Mr Wittes contacted the State Attorney and advised that a submission had been made to the Minister and that they were awaiting his signature to finalise the matter. According to third respondent he understood that this meant that all issues had been resolved. During the court proceedings on 12 December 2018 Legal Services sent an email to the State Attorney relating to the submission to the Minister. He realised then that the submission related to compliance with paragraph 3 of the order, i.e. to the exemption to be granted by the Minister.

⁴ It is not clear whether the affidavit of 13 December 2017 was placed before Jaji J. Had it been the learned judge would no doubt not have required a further affidavit to be filed.

He therefore contacted the legal advisor assigned to the matter who advised him that he should proceed to issue an amended birth certificate to GN in compliance with paragraphs 4 and 5 of the order. He states that this was the first time that he had received instructions relating to the matter.

- [25] He therefore immediately attempted to issue the amended birth certificate. However, the Department's computer system did not allow for such entry. He contacted his head office and explained the problem. He was told that the system has not been programmed to deal with such an instance and that a special function would need to be created in order to allow it to take place. He states that he has neither the knowledge nor the authority to create such a special function.
- [26] The explanation is repeated in the affidavit of 9 January except that it contains further averments regarding the subsequent steps taken to give effect to paragraph 5 of the order. These are that officials in the Legal Services department corresponded with senior officials in the Department in order to address the difficulty encountered in issuing an amended birth certificate to GN. In response the Director: Births, Marriages, Deaths & Records advised, on 8 January 2018, that it is not possible to comply with paragraph 5 of the court order. Instructions were then given to the State Attorney to appoint counsel and to apply for a variation or rescission of the order of 22 September 2017.
- [27] I shall deal with the rescission application hereunder. For present purposes it should be stated that the rescission application is confined to paragraphs 4 and 5 of Revelas J's order. It was stated in the founding affidavit that the application for exemption (as contemplated in paragraph 3 of the order) is under consideration by the Minister. By the time that the applications were argued before this court the first respondent had granted an exemption in terms of section 31 (2) (b) of the Immigration Act to EN.
- [28] At the hearing of the applications Ms Crouse, for the applicant, stated that she was not seeking an order for contempt at that stage. Instead she was pursuing the joinder of Erasmus, as the fourth respondent, in order to ensure that service of the order (of 22 September 2017) could be personally effected on first and second respondents since that had not yet been achieved. In the event that the joinder of Erasmus is ordered, she was seeking a postponement of the contempt application. Mr Cassim, for the respondents argued that the joinder of Erasmus was inappropriate inasmuch as it

amounted to an order of substituted service. He further argued that no purpose would be served by such order since the application for contempt against the first and second respondents is fatally defective by reason of them not having been cited in their personal capacities.

- [29] It is against this backdrop that I briefly turn to the joinder application. One would be forgiven for gaining the impression that the litigation is labyrinthine, with new twists and turns at every juncture. Ms Crouse contended that this was on account of the fact that the Department had frustrated attempts at service and had adopted an obfuscatory approach. Mr Cassim contended that it was because the incorrect procedure had been followed.
- [30] The applicant seeks to have Erasmus joined in the contempt proceedings as fourth respondent for the purpose of ensuring that the order of 22 September 2017, and any other related orders, are served on the first and second respondents personally. Erasmus is the Chief Director: Legal Services in the Department.
- [31] In the founding affidavit applicant's attorney, Ms Fourie, states that it is not possible to seek an order of contempt without the order having come to the knowledge of the first and second respondent. She further states the applicant has not been able to secure personal service of the order. The return of service in relation to original order reflects service on a legal clerk. After obtaining the rule nisi on 28 November 2017 service was again attempted. The sheriff was instructed to serve the order personally on the Minister. The return however, reflects service on a Ms Kabini, another legal clerk.
- [32] Ms Fourie states that within the Department a person of the rank below that of a Chief Director does not have access to either the first or second respondent. It is for this reason that the applicant seeks to join Erasmus, notwithstanding that he does not work in the same section as the second respondent.
- [33] The respondents and Erasmus oppose the application on the basis that the applicant has not made out a case that it is impossible to serve the order personally on the first and second respondent and on the basis that Erasmus is not the appropriate official to attend to service of the order upon the first and second respondents.

[34] In the opposing affidavit Erasmus states that the applicant seeks to have the first and second respondents held in contempt and to have them committed for such attempt. Yet neither of the respondents has been cited in their personal capacities in the application. Since no finding of contempt will be confirmed upon the return date in such circumstances, there is no good reason why he should be joined in the application. He further states that the sheriff is authorised to effect service and that the applicants have provided no explanation for why the sheriff did not effect personal service. To the extent that personal service is 'impossible' the proper course is to apply for an order authorising substituted service. Erasmus points out that the second respondent is the administrative head of the department. Below him are deputy directors general each overseeing designated functional areas. Below these are Chief Directors also with their assigned and designated areas of responsibility. The lines of communication are such that he is required to report to his immediate superior. He accordingly does not have access to a Deputy Director or the Director General other than via his line function superior. He also does not have direct and ready access to the Minister. He therefore states that he is not the appropriate official to attend to service of court process upon the second and first respondent.

[35] Rule 23(n) of the Eastern Cape Rules of Practice provides that,

Save for matters in which substituted service has been authorised, personal service of process will be required in divorce actions, applications for sequestration and contempt of court proceedings.

[36] Rule 4(2) provides for circumstances where it is not possible to effect service. In such instance application may be made for directions as to substituted service, and the provisions of section 5(2) apply. In order to obtain such order of substituted service the applicant must show that it is not possible to obtain service as is required (in this instance personal service); that the court has jurisdiction; that the applicant has a *prima facie* case; and that there is a reasonable likelihood that the proposed service will result in the process coming to the knowledge of the respondent or defendant.

[37] The procedure employed by the applicant is one of joinder, rather than one seeking authority to serve by way of substituted service. The relief sought however is akin to one of substituted service. In my view therefore the requirements for authorised substituted service should be established.

- [38] The applicant states only that it has been 'impossible' to obtain personal service. It appears that there was only one attempt made in relation to each instance. The returns do not indicate that service of the order could not be effected personally. They state merely that service was effected upon a named person at the place of business of the respondents. In my view the applicants falls short in this regard.
- [39] There is however a more significant difficulty. Erasmus states that he does not have access to the second respondent except via his line function superiors. He also states that he does not have access to the first respondent. There is therefore an established difficulty with the procedure envisaged. I am not satisfied, having regard to the explanation given by Erasmus that the process which is contemplated by the order sought will bring about personal service upon the first and second respondents. Furthermore, neither the first nor second respondent is cited in these proceedings in their personal capacity. There is therefore an insuperable difficulty, even if service is effected personally, to the granting of punitive or coercive orders against the first and second respondent for alleged contempt.
- [40] The Constitutional Court recently had occasion to set out comprehensively the law relating to civil contempt of court in *Matjhabeng Local Municipality v Eskom Holdings Ltd and others; Mkhonto and others v Compensation Solutions (Pty) Ltd* ("*Matjhabeng*").⁵ In that matter the court was concerned inter alia with the procedures to be applied in civil contempt; the standard of proof required and the question as to the joinder of the alleged contemnor in his / her personal capacity. The court stated that,⁶

The procedure and processes for contempt proceedings seeking committal should deviate from criminal prosecutions only to the extent necessary to make allowance for its unique status. In *Pheko II*, this Court endorsed the holding in *Fakie* that, because contempt proceedings resulting in committal combine civil and criminal elements, "it seems undesirable to strait-jacket it into the protections expressly designed for a criminal accused under section 35 (3) [of the Constitution]". Instead, the rights of a respondent where civil contempt is sought are grounded in section 12(1) of the Constitution which affords the alleged contemnors both substantive and procedural protections. I do not understand this to suggest that the rights of a respondent where civil contempt in committal is sought cannot be grounded in section 35 (3).

(Footnotes omitted)

⁵ 2017 (11) BCLR 1408 (CC)

⁶ At par [58]

[41] It is not necessary for present purposes to address the court's findings in regard to the different standard of proof that may apply depending upon the nature of the relief sought. Of significance for present purposes is the court's findings regarding the necessity to join an official against whom a finding of contempt and committal is sought, in his or her personal capacity. The court's reasoning is set out as follows:⁷

The law on joinder is well settled. No court can make findings adverse to any person's interests, without that person first being a party to the proceedings before it. The purpose of this requirement is to ensure that the person in question knows of the complaint so that they can enlist Counsel, gather evidence in support of their position, and prepare themselves adequately in the knowledge that there are personal consequences – including a penalty of committal – for their non-compliance. All of these entitlements are fundamental to ensuring that potential contemnors' rights to freedom and security of the person are, in the end, not arbitrarily deprived.

The principles which fundamental to judicial adjudication, in a constitutional order, were reaffirmed by this Court in its recent decision in *Lushaba*, where the Court, *per* Jafta J, endorsed the principles stated by Ackermann J in *De Lange*:

"[F]air procedure is designed to prevent arbitrariness in the outcome of the decision. The time-honoured principles that ... the other side should be heard [*audi alteram partem*], aim toward eliminating the proscribed arbitrariness in a way that gives content to the rule of law. ... Everyone has the right to state his or her own case, not because his or her version is right, and must be accepted, but because in evaluating the cogency of any argument, the arbiter, still a fallible human being, must be informed about the points of view of both parties in order to stand any real chance of coming up with an objectively justifiable conclusion that is anything more than a chance. Absent these central and core notions, any procedure that touches in an enduring and far-reaching manner on a vital human interest, like personal freedom, tugs at the strings of what I feel is just, and points in the direction of a violation."

It follows that the objection of non-joinder by the Municipality in *Matjhabeng*, specifically where the potential contemnor's section 12(1) rights are in the balance, is not a purely idle or technical one – taken simply to cause delays and not from a real concern to safeguard the rights of those concerned. There is however a caveat: this should not be understood to suggest that joinder is always necessary. There may well be a situation where joinder is unnecessary, for example, when a rule *nisi* is issued, calling upon those concerned to appear and defend a charge or indictment against them. Undeniably, in appropriate circumstances a rule *nisi* may be adequate even when there is non-joinder in contempt of court proceedings. This means that the rule is not inflexible.

(Footnotes omitted)

[42] The Constitutional Court proceeded to consider an argument (not advanced in the present case but which is nevertheless relevant) that the issue of a rule *nisi* in *Matjhabeng* meant that the person was in effect joined. The court considered four cases⁸ upon which reliance was placed. It concluded that

⁷ At para [92] – [94]

⁸ *Isamcor (Pty) Ltd v Dorbyl Light & General Engineering (Pty) Ltd, Dorbyl Light & General Engineering (Pty) Ltd v Isamcor (Pty) Ltd* 2007 (4) SA 467 (SCA) ("*Isamcor*") ; *Meadow Glen Homeowners Association v City of Tshwane Metropolitan Municipality* 2015 (2) SA 413 (SCA) ("*Meadow Glen*") ; *City of Johannesburg Metropolitan Municipality v Hlophe* [2015] 2 AllSA 251 (SCA) ("*Hlophe*") ; *Pheko and others v Ekurhuleni Metropolitan municipality (Socio-Economic rights Institute of South Africa as amicus curiae)* (No 2) 2015 (5) SA 600 (CC) ("*Pheko II*").

those judgments (referenced below) were not authority for the proposition that the joinder of an official in his / her personal capacity was not required. The court furthermore distinguished those instances where a rule *nisi* had been employed, principally on the basis that the procedure was convenient where a substantial number of parties might be affected. It found that that consideration did not apply since there was, in each case before it, only one person as an alleged contemnor who should have been joined.

- [43] Similar considerations apply in this instance where there are only two persons whose rights are affected. Accordingly the fact that a rule *nisi* was issued on 28 November 2017 calling upon the respondents to show cause why they should not be held in contempt and committed does not meet the requirement that the first and second respondents ought to have been joined in their personal capacities.
- [44] The effect of this is that applicant's application for contempt against the first and second respondents is not only defective for want of adequate proof of service (which the joinder seeks to remedy), it is fatally defective for want of joinder of the first and second respondents in their personal capacities.
- [45] The applicant did not, despite the issue being pertinently raised in opposition to the joinder of Erasmus, seek a postponement to effect such joinder. To the contrary, an argument was advanced that Erasmus has no authority to raise such objection on behalf of the first and second respondent. This rather missed the point made by Erasmus in his opposing affidavit and by counsel in argument on behalf of the respondents. Erasmus raised this defect as a ground for refusing his joinder in an application that is defective. This he was entitled to do.
- [46] In my view the objection to the joinder of Erasmus is a sound one. The applicant has not, in my view, made out a proper case for joining Erasmus in order to effect service of the original order (and any other order) upon the first and second respondent. In any event such joinder would not bring about a situation where a court, considering the application for committal of the first and second respondents in due course could grant such order.

- [47] As was noted in *Matjhabeng*⁹ courts have the inherent power at common law to order the joinder of parties even where there is no substantive application for joinder. In this matter however it will not be appropriate to make an order either joining parties or postponing the application so that such joinder may be effected.
- [48] There are two reasons for this. Firstly, it is common cause that the first respondent has complied with paragraph 3 of the order made by Revelas J on 22 September 2017, albeit after the contempt application was launched.
- [49] The second reason lies in the explanation presented by the third respondent for the non-compliance with the terms of paragraphs 4 and 5 of the order and the fact that there is, based upon the alleged impossibility of performance, an application for rescission of the judgment. I have set out the explanation hereinabove. Even though it may be susceptible of criticism, it is an explanation which on the face of it negatives a finding of wilful and *mala fide* disobedience. It is therefore to be strongly doubted that a postponement of the application to permit joinder of the first and second respondents personally would serve any purpose. If the respondent's contentions in regard to the rescission of the judgment are not upheld, then in that event the obligation to comply with the order will be affirmed. Such previous conduct as was based on the contention that the order cannot be complied with, will naturally no longer avail the respondents and their future conduct in giving effect to the order will have to be appraised upon a different set of facts.
- [50] It follows from this that, in the first instance, the application for joinder must be refused. It follows also from the reasons set out above that the application for contempt must be refused. The only question in regard to both applications is the appropriate costs order to be made.
- [51] The applicant is clearly motivated by a desire to protect and promote the best interests of the minor children concerned. Counsel for the applicant rightly pointed to the fact that Government of the Republic of South Africa is under international obligation to protect the rights of children who are, to all intents and purposes, stateless. The declaratory order granted by Revelas J on 22 September

⁹ At par [91]

declared the children to be in need of a 'durable solution'. Our Constitution requires that best interests of minor children are paramount in all matters affecting a child. The delay in dealing with the issues raised and the bureaucratic obfuscation evidenced by the manner in which the children have been dealt with all point to a failure to properly and fully give effect to the rights and interest of the children. This is not the first instance where an alleged inability to comply with a declaratory order made in terms of section 2 (2) of the Citizenship Act has arisen. Similar contentions were raised in the matter of *Richard Cathcart NO v Director General of Home Affairs and others* in which this court remarked on the Department's obfuscatory approach.¹⁰

[52] The assertion that the order cannot be carried into effect because the computer system makes no provision for capturing the details on the system need only be stated to be rejected as spurious. I shall touch on this more fully in dealing with the rescission application hereunder. For the present, a contention that a computer system does not allow for effect to be given to a court's declaratory order is extraordinary. It suggests a woeful abdication of human agency in the face of a computer system designed to give effect to the law.

[53] In the light of this I consider it appropriate, as a mark of this court's displeasure, to deprive the respondents of their costs in the joinder and contempt applications. It will therefore be just and equitable that each party pay their own costs in respect of these applications.

The rescission application

[54] I turn now to the rescission application. The respondents seek only an order that paragraphs 4 and 5 of the order of 22 September 2017. The essence of the application for rescission is to be found in the following passages of the founding affidavit:

38. Accordingly, save for Glory having been born in South Africa, and to date having lived his young life here, for purposes of the acquiring of citizenship, he does not meet the requirements of section 2 (2) (a) of the Citizenship Act in that, he is, in the laws applicable in the Democratic Republic of the Congo, regarded as a citizen of that country and / or at the very least, has a right to such citizenship. He has no similar entitlement to South African citizenship.

¹⁰ Case no 993/2017 & 11/2016, ZAECPHC, Unreported, Delivered 3 May 2018

39. In these circumstances the court *a quo* erred in finding that section 2 92) of the Citizenship Act could come to Glory's assistance and in compelling the Department to grant him citizenship in terms of that subsection.
40. By granting the order she did, the learned Judge Revelas erred as her order in paragraphs 4 and 5 thereof was not legally competent, was and is without legal foundation and ought to be rescinded in part and thus varied in its entirety.
41. For sake of completion (sic), I point out that the order granted in paragraph 5, pertaining to the entry on the population register of Glory's details and the issuing to him of an identity number are also prohibited by legislation on the facts of this case.

[55] The deponent then sets out the provisions of section 5 of the Births and Deaths Registration Act, 51 of 1992 and avers that it precludes the entry of the child GN's details into the population register because he is not a citizen of the Republic.

[56] It will be seen that the basis of the rescission application is that the learned judge erred in law and fact in granting the order. Rule 42 (1) (a) provides that,

The court may, in addition to any other powers it may have, *mero motu* or upon the application of any party, rescind or vary:

- (a) An order or judgment erroneously sought or erroneously granted in the absence of a party affected thereby;

[57] There is no challenge to the procedural aspects. It appears from the affidavit explaining the respondents' default that the application was properly served and that the State Attorney had made numerous attempts to obtain instructions without success. It is accordingly conceded that the application was properly before Revelas J and that the learned judge was entitled to consider and grant relief against the respondents in their absence.

[58] *Harms*¹¹ states that:

An order is erroneously granted if it was legally incompetent for the court to have made such an order, if there was an irregularity in the proceedings or if the court was unaware of facts, if known to it, would have precluded it from a procedural point of view from making the order. When a simple summons lacked averments to support the cause of action the judgment based on it is without foundation and consequently erroneously granted. The error need not appear *ex facie* the record. But this does not mean that if a party is procedurally entitled to judgment it could be said that the judgment had been granted erroneously because the court was unaware of a defence which the defendant could have raised but did not. Consequently, a *iustus error*, even if induced by a non-

¹¹ Civil Procedure in the Superior Courts at B42.4

fraudulent misrepresentation by the successful litigant, does not entitle a party to have the judgment set aside.

(Footnotes omitted)

[59] In *Marais v Standard Credit Corporation Ltd*¹² it was held that the term 'erroneously' is wide enough to include an instance where for want of an essential averment the summons (or founding affidavit) does not establish a cause of action. In such situation there is no legal foundation to the judgment and it is erroneously granted. Mr Cassim, for the respondents, argued that this includes an incorrect averment or submission in law. I disagree. As pointed out in the passage from *Harms* above, a non-fraudulent misrepresentation of fact – what would qualify as an incorrect averment in the papers – which induces an error (on the part of the judge granting the order) does not entitle the party to obtain rescission of the judgment.

[60] Counsel's argument focused upon the set of facts before the learned judge, seeking to distinguish the situation from that which pertained in the *Cathcart*¹³ matter, arguing that on the facts as disclosed by the applicant, GN, as a matter of law is not entitled to South African citizenship. It was therefore submitted that the error was such as to render the order 'erroneously granted' and that it should therefore be set aside to the extent prayed.

[61] I do not agree. Whether or not the learned judge erred in her appraisal of the facts or whether she erred in the application or interpretation of section 2 (2) of the Citizenship Act is a matter to be addressed on appeal. The learned judge heard full argument in relation to the application before her and thereafter granted the order. Even if it is to be assumed that there was an error (which I do not find) such error does not render the judgment 'erroneously granted'.¹⁴ Accordingly on this basis, the application for rescission cannot succeed.

[62] The respondents however asserted a further ground, namely that the relief in paragraph 5 of the order, is prohibited by the Births and Deaths Registration Act. Section 5 of the latter Act provides as follows:

- (1) The Director-General shall be the custodian of all –
 - (a) documents relating to births and deaths required to be furnished under this Act or any other law; and

¹² 2002 (4) SA 892 (W) at 897A-B

¹³ *Cathcart NO* fn 10 above

¹⁴ Similar arguments were advanced and rejected in the *Cathcart NO* matter. No appeal has been noted against that judgment.

- (b) records of any births and deaths preserved, prior to the commencement of this Act, in terms of the Acts repealed by this Act.
- (2) Particulars obtained from the documents referred to in subsection (1) (a) shall be included in the population register and such inclusion is the registration of the births and deaths concerned.
- (3) In the case of a non-South African citizen who sojourns temporarily in the Republic, particulars obtained from documents mentioned in subsection (1) (a) shall not be included in the population register and the issuing of a certificate in respect of such particulars is the registration thereof.

[63] The respondents relied on section 5(3) above, asserting that it applies to GN and accordingly, as a matter of law, his details cannot be entered into the population register.

[64] The assertion is without any merit. It proceeds from an entirely incorrect reading of the section and, furthermore, a disregard of the effect of the declaratory order made by Revelas J in paragraph 4 of the order which, it bears repeating, provides,

That G. N., born on 10 January 2011 is declared to be a South African citizen by birth, as contemplated in section 2(2) of the South African Citizenship Act 88 of 1995, as amended.

[65] GN's status as a citizen of South Africa is determined by the order. It is not dependent upon registration or even acceptance by the respondents. As a matter of law, from the date of the order, GN was and is a citizen. Thus, at the point at which effect is to be given to the order, pursuant to paragraph 5 thereof, GN was not 'a non-South African citizen who sojourns temporarily in the Republic'. Section 5(3) therefore finds no application. It certainly does not render paragraph 4 or 5 of the order 'incompetent' and therefore, susceptible to rescission.

[66] It follows that the respondents' application for rescission cannot succeed. There is no reason why the costs should not follow the result.

[67] In conclusion, it is apposite to remark briefly on the underlying issue which animates this litigation, namely the fraught attempts to secure appropriate protection of the children's rights. It is not necessary to spell out the international obligations which attach to situations such as these where undocumented children are unable to assert their rights to nationality and citizenship. I have already stated that the paramount best interests of the children, which accord with the State's international law obligations,

ought to direct the respondents' actions in regard to compliance with the order made on 22 September 2017. It is to be hoped that the first respondent will take due and proper cognisance of these obligations and that the second respondent, as the administrative head of the Department, will act with proper expedition to ensure that any such impediments to carrying out the terms of paragraph 5 of the order, as may exist, are resolved.

[68] In the light of the circumstances which gave rise to the application for contempt and the interlocutory application to join a fourth respondent, I intend to make an order directing the second respondent to take steps necessary to ensure compliance with paragraph 4 and 5 of the order and to report to the court on the steps taken. The respondents are of course represented in these proceedings by the State Attorney and by senior and junior counsel. It is to be expected therefore that the State Attorney will advise each of the respondents of the outcome and what is expected of them in relation to compliance with the original order. In the circumstances the State Attorney will be also be directed to provide a copy of the judgment to each of the respondents and to file an affidavit with the Registrar setting out the method by which and the date upon which same was done.

[69] In the result I make the following orders:

1. The rule *nisi* dated 18 January 2018 issued in the applicant's joinder application is discharged.
2. The rule *nisi* dated 28 November 2017 issued in the applicant's contempt of court application is discharged.
3. Each party is to pay their own costs in relation to the joinder and contempt applications.
4. The respondents' application for rescission of the Order of Revelas J dated 22 September 2017 is dismissed with costs.
5. The second respondent is ordered to take all steps necessary to give immediate effect to paragraphs 4 and 5 of the Order dated 22 September 2017 and, no later than 15 days after

the date of this order, to deliver to the applicant's attorneys and to file with the Registrar of this Court an affidavit setting out the steps taken to comply with outstanding obligations imposed by the Order of 22 September 2017.

6. Service of this Order is to be effected upon the second respondent c/o the State Attorney, Port Elizabeth.
7. The State Attorney is directed to provide copies of the judgment and Order to the respondents and is further directed to deliver to the applicant's attorneys and to file with the Registrar of this Court an affidavit setting out the method by which and the date upon which same was done.

G. G. GOOSEN
JUDGE OF THE HIGH COURT

Appearances:

For the Applicant
Adv. L. Crouse
Instructed by Legal Aid South Africa
(Port Elizabeth)
For the Respondents
Adv. N. A. Cassim SC
(Assisted by Adv. S. Freese & Adv. G. Appels)
Instructed by State Attorney, Port Elizabeth